

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America,)	CRIMINAL NO. 3:04-0074-CMC
)	
v.)	OPINION and ORDER
)	
David K. Simpson,)	
)	
Defendant.)	
_____)	

This matter is before the court on Defendant's motion to "Correct Criminal History Score," filed in this court pursuant to Federal Rule of Civil Procedure 60(b). Dkt. # 23 (filed Aug. 12, 2009). Defendant states in his motion that the court should "accept this Motion (not to be construed as a § 2255)." Mot. at 1. The Government responded in opposition to Defendant's motion on October 23, 2009. Counsel then appeared on behalf of Defendant, and requested an extension of time to respond to the Government's opposition to Defendant's motion. An extension was granted through January 2, 2010. Dkt. # 31 (filed Nov. 30, 2009). No response has been received and this matter is therefore ripe for consideration.

The court agrees with the Government that this motion is, in reality, a successive § 2255 motion. Defendant's failure to seek permission to file a second or successive petition in the appropriate court of appeals prior to the filing of the petition in the district court is fatal to the outcome of any action on the petition in this court. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), placed specific restrictions on second or successive motions under 28 U.S.C. § 2255. Prior to filing a second or successive petition under § 2255, Defendant must obtain certification by a panel of the Fourth Circuit Court of Appeals allowing him to file a second or successive petition. As provided in 28 U.S.C. § 2244, "[b]efore a

second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). This he has not done.

Therefore, this motion is dismissed as this court is without jurisdiction to consider it.

CERTIFICATE OF APPEALABILITY¹

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court’s assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is **denied**.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
February 4, 2010

¹On December 1, 2009, the Rules Governing Section 2255 Cases in the United States District Courts were amended to require a District Court to issue or deny a certificate of appealability when a final ruling on a habeas petition is issued. *See* 28 U.S.C. § 2255 Rule 11(a).